

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 7207 of 1988

Date of Decision : 3-12-1998

For Approval and Signature:

Hon'ble MR.JUSTICE R.BALIA.

Hon'ble MR.JUSTICE A.R.DAVE

1. Whether Reporters of Local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not?
3. Whether their Lordships wish to see the fair copy of the judgment?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India,1950 or any order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

R OCHHAVLAL & COMPANY

Versus

CHIEF COMMISSIONER OF INCOME-TAX CENTRAL

Appearance:

MR HM TALATI for Petitioners

MR RP BHATT for Respondent No. 1

CORAM : MR.JUSTICE R.BALIA. and

MR.JUSTICE A.R.DAVE

Date of decision: 03/12/98

ORAL JUDGEMENT

This petition has been filed by three petitioners M/s.R. Ochhavlal & Co., the firm and its two partners Mr. Manharlal Ochhavlal Parikh and Mr. Surendra Ochhavlal Parikh. The relief claimed in this petition relates to prosecution launched against the three petitioners under the provisions of the Income Tax Act, 1961 and about the application for waiver of penalty and interest in respect of income chargeable for tax in the case of firm for the Assessment Year 1980-81 and 1981-82. One of the petitioners - Mr. Manharlal Ochhavlal Parikh - has died during the pendency of this petition. As on the death of an accused criminal proceedings against him would abate, so far as the petition filed by Mr.Manharlal Ochhavlal Parikh to that extent is concerned, the right to sue does not survive and the petition on his behalf has to that extent become infructuous. So far as relief as to waiver of penalty and interest is concerned, the same relates to income chargeable in the hands of firm primarily and as the petition has been filed by the firm as well as both the partners, in our opinion the petitioners No.1 and 3 represent the estate of deceased petitioner No.2 sufficiently. Therefore the petition has been heard on merit, which is of quite old age.

2. The facts in brief, relevant for the present purpose, may be noticed. For the assessment years 1980-81 and 1981-82, the previous years ending with the end of S.Y. 2035 and S.Y. 2036 respectively, additions were made in the income returned by the firm and its partners, the petitioners. Additions also included on account of concealed income introduced by way of cash in the name of various purchasers, and penalties for concealment under section 271 (1)(c) were also levied. Interest under various provisions of the Act were also levied, with the details of which we are not presently concerned. Criminal prosecution against the firm and its partners were also initiated by lodging complaint under section 276C and section 277 of the Income Tax Act, 1961 after obtaining order under section 279(1) of the Income Tax Act, 1961 from the Commissioner of Income Tax (Central), Ahmedabad on 29-3-1984, validity of which the petitioner contends. Proceedings are pending in the court of Chief

Metropolitan Magistrate, Ahmedabad since then, which are Criminal Case No.735/84 in relation to assessment year 1980-81 and 738/84 in relation to assessment year 1981-82. It is stated in the petition that appeal against said orders of assessment as well as penalty were dismissed by C.I.T.(Appeals), and further appeals were filed before the Income Tax Appellate Tribunal. The petitioners had also approached the Settlement Commissioner under section 245(c)(1) of the Income Tax Act, 1961 requesting him to entertain the application of the petitioners for settlement of their case. They requested the Chief Metropolitan Magistrate to stay the proceedings in the aforesaid criminal cases, pending consideration of the petitioners' case for settlement, which was refused by the Metropolitan Magistrate, against which the petitioners have preferred Criminal Misc. Applications No.1412/85 and 1413/85 for staying the proceedings. Stay of further proceedings was granted in this case. Subsequently as the effort of compounding the offence with the Department under section 245-C having failed, it is informed by the learned counsel for the petitioners, the said Criminal Misc. Applications were withdrawn.

3. After the petitioners' effort to compound the offence failed, an amnesty scheme was introduced by the Central Board of Direct Taxes, inviting erring assesseees and tax evaders to make clean breast of their concealed income on the assurance of immunity from penalties and prosecutions. The scheme was notified on 14-2-1986 to be effective with effect from 17-2-1986. Simultaneously the Board also issued circulars of even date explaining the import of the scheme in the form of questions and answers. The essential feature of the scheme was that disclosure of income be made before detection, in order to claim full immunity under the scheme. Import of expression 'before detection' was explained in Circular No.451 dated February 17, 1986. Question No.19 and its answer is reproduced below:

"Question No.19.-- Kindly clarify the expression
"before detection" by the department"?

Answer. -- If the Income-tax Officer has already found material to show that there has been concealment, that would mean the Department has detected the concealment. If the Income-tax Officer only had prima facie belief, that would not mean concealment has been detected."

In the very same circular question No.28 and its answer

clearly suggested that notwithstanding the aforesaid import of expression 'before detection' and additions made in an assessment does not fall within the scope of disclosure 'before detection', the benefit of amnesty scheme was extended in respect of such additions also which have been subjected to appeals and the appeals were pending at different levels, subject to condition that before surrendering the amount as income the assessee withdraws the appeal. In that event though full immunity is not assured, but a lenient view in the matter of consequences, which followed from such additions made on detection, were to be mitigated.

Question No.28.-- Where an addition is contested in appeal, whether an assessee could make a declaration and agree to pay tax thereon?

Answer.-- Yes, the assessee should withdraw that appeal and make a declaration before the administrative Commissioner. In such a case, a lenient view will be taken, though such a declaration cannot be taken as entirely voluntary."

This scheme which was initially meant for making disclosures between 17th February, 1986 to 31st March, 1986 was extended upto 31st March, 1987. The petitioners filed revised returns on 27th March, 1986 declaring the additions made in the original assessment plus additional amount which, according to the petitioners, was suggested by the revenue authorities, and for withdrawal of appeals No. 788 and 789 of 1985 filed by the firm containing the additions made in the assessment, and which were then pending before the Income Tax Appellate Tribunal for assessment years 1980-81 and 1981-82, applications were also made on that very day. The Tribunal made an order on 30th March, 1987 on such applications which reads as under:

" By its application dated 27-3-1987, the assessee states as follows:-

"Reg: R. Ochhavlal & Company Assessment
years 1980-81 and 1981-82 Withdrawal of
appeals.

This is in connection with the appeals filed in our case before the honourable Income-tax Appellate Tribunal, Bench - Ahmedabad under receipt No.788 and 789 A/85 dated 12-2-1985.

As the undersigned are filing returns of

Assessment Year 1980-81 and 1981-82 under the Amnesty Scheme, we hereby withdraw the said appeal filed before the I.T.A.T. Bench Ahmedabad. We therefore request you to kindly treat the aforesaid two appeals as withdrawn and cancelled."

In view of what is stated above, we grant the permission to the assessee to withdraw the appeals. The appeals are, therefore, dismissed for non-prosecution."

The petitioners paid tax also as per the revised returns submitted and moved applications for waiver of penalties and interest and withdrawal of prosecution. By his two separate letters dated 10th November, 1987 the Income Tax Officer communicated that the Board has rejected both the applications. While the application for waiver of penalty and interest was rejected by disclosing reason that as the return which is purported to have been filed under amnesty scheme, it was filed only after detection. Hence there cannot be any question for waiver of penalty under section 273A. In the order communicating rejection of application for withdrawing the criminal prosecution no such reason has been stated. The present petition is confined to the relief that the decision of the Board communicated through the Income Tax Officer vide his letter dated 10-11-1987 annexure-T cumulatively be quashed and the C.I.T. (Central) / Chief Commissioner of Income Tax be directed to accept and act upon the petitions dated 27-3-1987, 13-4-1987 and 20-4-1987, and that the C.I.T. (Central)/ Chief Commissioner of Income-tax Gujarat be directed that the prosecutions launched against the petitioners be withdrawn.

4. The petitioners in the instant case has sought to contend that before issuing sanction for prosecution no notice was issued to the petitioners. Therefore the initiation of prosecution itself was bad and the same may be quashed. We are of the opinion that this issue is not open to challenge by way of separate petition. This contention can be raised during the course of prosecution before the court where trial is pending.

5. It has been urged by the learned counsel for the petitioners that the petitioners having been assured to be treated leniently under the amnesty scheme even though they had not fulfilled the criterion of filing return before detection, in case they were to make disclosures pending appeals and their appeals are withdrawn, acting on that assurance they terminated their remedies to their

detriment and have submitted disclosures not only of the sums added in the original returns filed by them but also additional sums and have paid taxes as per the scheme. Therefore their application for waiver of penalty and interest as well as for withdrawing the complaints/prosecution cannot be rejected simply on that ground. Least meaning which can be assigned to the assurance in the Central Board of Direct Taxes' own circular of treating a person making disclosures by withdrawing pending appeals against additions to be treated leniently would mean atleast not to prosecute criminally.

6. Learned counsel for the revenue reiterated that once additions have been made in regular assessment it is a case of detection and any disclosure of income thereafter is not disclosure of income before detection and, therefore, provisions of amnesty scheme did not extend to the petitioners' case. He further contended that even if the circular of Central Board of Direct Taxes is taken as part of amnesty scheme, and the assurance with which the Board can be held bound, as prosecution had already been launched before the amnesty scheme was introduced, it was not within the domain of the authorities under the Income Tax Act to withdraw the prosecution. No provision under the Income Tax Act provide for such withdrawal. The explanation of amnesty scheme as contained in Circular dated 17-2-1986 referred to above did not assure any full immunity in such case and petitioners cannot claim full immunity as claimed by insisting on acceptance of such application.

7. We have given our anxious consideration to the contentions raised before us. At the outset we may state that the amnesty scheme itself is not a part of the legislative enactment, meaning of which could not be made dependent on interpretation put by Central Board of Direct Taxes by issuing circulars. The amnesty scheme itself emanates from the Board in exercise of its power to issue instructions in the course of implementing the Act. Circulars explaining the ambit and scope of its own scheme cannot be placed at the level of circulars issued by the Board explaining the meaning of the statute. In fact the contemporaneous circular explaining the scheme by the very authority in exercise of the very same power is a relevant material which may be taken into account while considering the scope and ambit of any scheme like the amnesty scheme in question, particularly in the facts and circumstances that amnesty scheme as well as clarification about its operation has been issued simultaneously by the same authority.

8. In the present case it is apparent that ordinarily once an addition has been made by the Income-tax Officer thereafter it cannot be a case of voluntary disclosure so as to invite application of amnesty scheme as such. Remedy in such case was only to prosecute the appeals. However, it is also apparent that those assesseees who were prosecuting their appeals against additions made by the Income-tax Officer were also invited to participate in the scheme on the assurance of being treated leniently in the matter of imposition of penalty and prosecution by foregoing their right to proceed with the remedies by issuing clarifications in the form of question No.28 and answer thereto by the Central Board of Direct Taxes on the very date with effect from which the amnesty scheme was to put effective. It is also not denied that the amnesty scheme which was to be effective between 17-2-1986 and 31st March, 1986 was extended upto 31st March, 1987 and the petitioners had acted in terms of the assurance held out in the Board's clarificatory circular dated 17th February, 1986 referred to above by filing revised return declaring the additions made in the original assessment plus additional sum to be their income of the years in question followed with withdrawal of appeals on that ground before the closure of amnesty scheme. Thereafter only they made respective applications for waiver of interest and penalty as well as for withdrawing prosecution when they have complied with conditions of its applicability as held out by the Board. In this scenario it was not open for the authorities to reject those applications solely on the ground of detection found in the original assessment order without further considering what lenient view could be taken in the facts and circumstances of the case attending to the petitioners' case in the matter of concealment and disclosure subsequently made, when the assessee gives up the contentions which are pending decision at higher echelon of adjudication.

9. It may be noticed that the amnesty scheme floated by Board is not dehors the provisions of Act of 1961. Section 273A envisages waiver of penalties and interest in suitable cases. Section 279(1A) provides that where penalties have been waived or reduced in exercise of power under section 273A, the criminal proceedings cannot be proceeded with. Section 279(2) makes the offences in relation to which prosecution has been launched compoundable. Law is also settled that where a power has been vested in any authority for the benefit of any person, though discretionary in character, is coupled with duty upon such authority to exercise such discretion

in judicious manner for the purpose for which it has been so vested when conditions for exercise of such power has been shown to exist.

10. So far as the question about want of jurisdiction on the part of the authorities under the Income-tax Act to withdraw the prosecution once it has been launched is concerned is also not well founded. Firstly it is to be noticed that under section 279(1A) a person cannot be prosecuted for offence under section 276C or 277 in relation to the assessment or reassessment in respect of which the penalty imposed or imposable on him under clause (iii) of sub-section (1) of section 271 has been reduced or waived under section 273A. This postulates that even in a case where penalty has been imposed for concealment of income under section 271(1)(c)(iii) and thereafter on an application under section 273A, said penalty has been reduced or waived, prosecution cannot be proceeded further. The provision is not inhibitive in prohibiting proceeding with prosecution only in case prosecution is not already launched. It takes into effect that in case penalty is reduced or waived criminal prosecution must fall and prohibits the department from proceeding with the prosecution against a person in whose case penalty under section 271 (1)(c)(iii) has been reduced or waived under section 273A, which is a discretion to be exercised by the Commissioner, where condition for exercise of such discretion is made out. Amnesty scheme too emanates from the provisions of section 273A laying down that, on fulfillment of certain conditions, the Commissioner shall exercise power of reducing or waiving penalty as per the scheme. If that be so, the argument that once prosecution is launched authorities under the Act are not left with any authority to withdraw from the prosecution is not acceptable. As soon as power under section 273A is exercised, section 279(1A) becomes operative. Independent of mandate under section 279(1A) even where power under section 273A has not been exercised or exercisable, subsection (2) of section 271 specifically empowers the Board, the Chief Commissioner or the Director General to compound offence under Chapter XXII either before or after institution of proceedings. Now after amendment the power has been conferred to the Chief Commissioner or the Director General. This power of compounding is there at all stages either before or after institution of proceedings. Amnesty scheme furnishes a general guideline for exercise of such power under the Statute, during the period it is operative.

11. That apart, no specific mode of trial having been

prescribed under the Income Tax Act the criminal prosecution under the Income Tax Act are governed by the provisions of the Criminal Procedure Code. Section 4 of the Criminal Procedure Code clearly envisages that all offences under any other law shall be investigated, inquired into, tried, and otherwise dealt with according to the provisions of Cr.P.C., but subject to any enactment for the time being in force regulating the manner or place of investigating, inquiring into, trying or otherwise dealing with such offences. Thus in the absence of any specific provision as to investigation, inquiry and trial prosecution has to be dealt with in accordance with the provisions of the Code. Under section 257 of the Code, where prosecution is on a complaint, a complainant, any time before any final order is passed, may withdraw his complaint against the accused on satisfying the Magistrate that there are sufficient ground for permitting him to withdraw such complaint. Thus it cannot be said, simply because prosecution has already been commenced before the introduction of amnesty scheme and filing of the application by the petitioners, that the authorities under the Income Tax Act are powerless to withdraw the complaint or are bound to proceed with the prosecution.

12. We, therefore, are of the opinion that the respondents have not acted in terms of the assurance held out by them under the amnesty scheme promulgated by the Board in rejecting the applications made by the petitioners solely on the ground of having been filed after additions were made in assessment orders when the petitioners were allowed to make such disclosures by surrendering their plea against such additions in appeal which was pending. It is as a result of the respondents' act that the petitioners were rendered remediless and were made to withdraw from prosecution of the remedies provided under the Act and to follow a different course laid by the Board itself. The Board was bound to consider such applications and take lenient view in the case of petitioners. We refrain from expressing any opinion about what exactly should be the scope and ambit of lenient dealing, but suffice it to say, it may be less than total immunity, but certainly it also cannot be construed as no immunity to any extent.

13. We, therefore, quash the orders rejecting the petitioners' applications for withdrawing the prosecution as well as for waiving or reducing the penalty and interest as communicated vide letters dated 10th November 1987 cumulatively marked annexure-T to the petition, and direct the respondents to consider the applications

afresh in accordance with law. In the facts and
circumstances of the case there shall be no order as to
costs.

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